

1 Mark G. Tratos (Bar No. 1086)
tratosm@gtlaw.com
2 F. Christopher Austin (Bar No. 6559)
austinc@gtlaw.com
3 Laraine M. I. Burrell (Bar No. 8771)
burrelll@gtlaw.com
4 GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
5 Las Vegas, Nevada 89169
Telephone: (702) 792-3773
6 Facsimile: (702) 792-9002

7 Counsel for Defendant
MORTGAGEIT, INC.

8
9
10 UNITED STATES DISTRICT COURT
11 DISTRICT OF NEVADA

12
13 HEIDI DUFFY,

14 Plaintiff,

15 vs.

16 ONE WEST BANK as successor-in-
interest; TRUSTEE CORPS;
17 MORTGAGEIT; DOES I through 100,
inclusive,

18 Defendants.
19
20

NO. 2:09-CV-001780-JCM-GWF

**DEFENDANT, MORTGAGEIT, INC.'S
MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM PURSUANT TO
FRCP 12(b)(6)**

21 Pursuant to Fed.R.Civ.P. 12 (b) (6), Defendant, MORTGAGEIT, INC.
22 ("MORTGAGEIT"), by and through its counsel of record, GREENBERG TRAURIG, LLP,
23 hereby moves to dismiss the Complaint filed by Plaintiff, HEIDI DUFFY, ("Duffy" or
24 "Plaintiff"), for failure to state a claim upon which relief can be granted.

25 This Motion is made and based upon the following Memorandum of Points and
26 Authorities, all papers and pleadings on file herein, and the argument of counsel to be

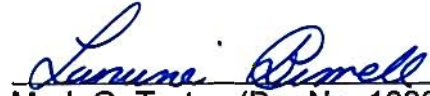
27 ///

28 ///

1 made at the time of the hearing.

2 DATED: September 16, 2009.

3 GREENBERG TRAURIG, LLP

4 

5 Mark G. Tratos (Bar No. 1086)
6 F. Christopher Austin (Bar No. 6559)
7 Laraine M. I. Burrell (Bar No. 8771)
8 3773 Howard Hughes Parkway
9 Suite 400 North
10 Las Vegas, Nevada 89169
11 Counsel For Defendant
12 MORTGAGEIT, INC.

13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
Greenberg Traurig, LLP
Suite 400 North 3773 Howard Hughes Parkway
Las Vegas, Nevada 89169
(702) 792-3773
(702) 792-9002 (fax)

MEMORANDUM OF POINTS AND AUTHORITIES

1. BACKGROUND INFORMATION

A. Introductory Statement

The claims and allegations in Plaintiff's Complaint concern a foreclosure action, and claims of other irregularities related to real property located at 213 Night Fall Terrace, Henderson, Nevada. (The "Subject Property").¹ This Complaint is likely a form document obtained online for a few dollars, or from a "foreclosure shop" by the *Pro Se* Plaintiff and has no factual connection to any specific aspect of Plaintiff's loan with MortgageIT. It is also likely that the Plaintiff, a bartender at a local casino, did not draft the allegations contained in the Complaint the crux of which is that the loan was a disguised securities transaction and the issuance of the unregulated security was without proper authority and in violation of the United States Securities and Exchange Commission ("SEC") rules and regulations. (Complaint ¶¶ 9(b) & (c)).

The Complaint includes the following allegations by the Plaintiff:

- The mortgage transaction was in reality a disguised securities transaction which the lender and other unknown parties would transfer to other third parties who would sell portions or "tranches"² to other investors so that all parties - except Plaintiff - would profit from the scheme. (Complaint ¶¶ 9 (b)).

Plaintiff has not alleged any factual basis as to what a securities transaction is, and why the subject mortgage met the elements to be considered a securities transaction versus being a "regular" mortgage. Plaintiff's vague and overbroad allegations concerning "unknown parties," "third parties," and "other investors" strongly suggests there might be others responsible for Plaintiff's alleged harm while nothing in this allegation suggests any wrongdoing by MortgageIT, nor does it identify how the alleged conduct is wrongful or violation of a securities violation.

¹ Plaintiff assert eight claims for relief: (1) Breach of Contract; (2) Breach of the Covenant of Good Faith and Fair Dealing; (3) Negligence; (4) Fraud/Misrepresentation; (5) Civil Conspiracy; (6) Rescission; (7) Wrongful Foreclosure; (8) Quiet Title; and (9) Injunctive Relief, Against All Defendants.

² Plaintiff has failed to define "tranches" which is generally used in the investment arena to identify one of a number of related securities.

- Defendant did not fulfill its duty owed to the Plaintiff by misrepresenting, or omitting critical facts, which would have apprised Plaintiff that the process was not a "normal mortgage loan," but was in fact a "concealed securities transaction." (Complaint ¶23).

Plaintiff has failed to identify a single fact establishing why she believed her mortgage loan was not "normal;" what a "normal" loan is and how her loan differed from the "norm." In addition, she has failed to identify what factual basis she has to believe it was a "concealed securities transaction." Again, nothing in this statements alleges any wrongdoing by MortgageIT.

- Defendant has been the beneficiary of government bailouts that also satisfy the terms of the "note" and said bailouts constitute payment as well. Defendant also failed to inform Plaintiff of the nature of the "money trail" which would prove the terms of the note were different from that originally presented to her. (Complaint ¶26).

No factual basis is given as to why Plaintiff believes any defendant to this action has received a government bailout and what relevance it has to this action, or the loan on the Subject Property. Plaintiff has also failed to give any factual basis as to why she believes the "note" was paid by a government bailout and that she was relieved of her obligations to make payments on the loan when no such terms and conditions are identified in the Deed of Trust. Plaintiff has also failed to give any facts as to why she believes the terms of the note were different from any terms provided to her in writing concerning the loan with MortgageIT.

Regarding Plaintiff's causes of action, to have standing to bring a claim based upon foreclosure or an irregularity in the sale procedure of real property, the Plaintiff must first establish that no failure of performance to tender mortgage payments existed on her part. (*Collins v. Union Federal Savings & Loan Ass'n.*, 99 Nev. 284, 304, 662 P.2d 610623 (1983)). Plaintiff has not tendered the undisputed amount and therefore does not have standing to bring any of her claims. The Complaint should be dismissed

1 in its entirety.

2 Plaintiff intentionally misrepresents her knowledge and understanding of real
3 estate transactions to this Court. Plaintiff alleges that the Defendants took advantage of
4 her "lesser knowledge, skill, education and training regarding complicated mortgage
5 loans and the securities transactions they create and contain." (Complaint ¶ 17). Yet
6 Plaintiff purports to have a sufficient understanding of mortgage loans and securities
7 transactions to be able to draft a Complaint herself making allegations of securities
8 violations, and for filing this lawsuit "*pro se*." Moreover, as public records show, Plaintiff
9 is well-versed in mortgage transactions and upon information and belief, had owned a
10 least one residence in Las Vegas prior to purchasing the Subject Property.³ In fact, the
11 subject loan was a refinance on the same Subject Property showing that the Plaintiff
12 had gone through the loan process previously, and apparently without any
13 misunderstandings on her part. (See Copy of Uniform Residential Loan Application,
14 attached to Request for Judicial Notice Exhibit F.)

15 Upon information and belief, Plaintiff misrepresents her understanding of loan
16 agreements and other transactions related to the real property. It is inequitable for
17 Plaintiff to attempt to gain an unfair advantage by failing to make full and truthful
18 disclosures to this Court and to Defendants.

19 **B. Plaintiff's Allegations**

20 Based on vague, non-committal averments, Plaintiff purports to state the following
21 claims against all Defendants: (1) Breach of Contract; (2) Breach of the Covenant of
22 Good Faith and Fair Dealing; (3) Negligence; (4) Fraud/Misrepresentation; (5) Civil
23 Conspiracy; (6) Rescission; (7) Wrongful Foreclosure (8) Quiet Title; and (9) Injunctive
24 Relief. Despite the difficulty of ascertaining the nature and basis of the Plaintiff's claims,
25 all of the causes of action stated in the Complaint appear to be based on the following
26 factual predicates:

27
28 ³ See Printout from Clark County Recorder's Website attached to Request for Judicial Notice as Exhibit L.

- 1 • On or around October 2006, Plaintiff entered into an agreement with
- 2 MortgageIT to re-finance her existing loan. (Complaint ¶ 8).
- 3 • The lender, MortgageIT was only acting as a "front" for unknown,
- 4 undisclosed third parties who were the true source of the funds for the
- 5 loan. (Complaint ¶ 9(e)).
- 6 • Shortly following the closing of the loan, in or around February 2007, the
- 7 loan was transferred to Indymac Bank who became the servicer of the
- 8 loan. (Complaint, ¶8).

9 Plaintiff refers to all Defendants interchangeably, even though there are considerable
 10 differences in the roles played by each Defendant in this matter. As to Defendant
 11 MortgageIT, the following predicate facts are relevant as they limit MortgageIT's
 12 involvement and obligations in this matter:

- 13 • In or about October 16, 2006, Plaintiff entered into an agreement with
- 14 Defendant MortgageIT to re-finance her existing loan. (Complaint ¶ 8).
- 15 • Shortly following the loan closing, on January 4, 2007, the loan was
- 16 transferred to Indymac Bank, who became the "servicer" of the loan."⁴
- 17 (Complaint ¶ 8).

18 To the extent Plaintiff's allegations and claim for relief are premised upon the
 19 loan actually being a "disguised securities transaction" and a violation of SEC rules and
 20 regulations, they should be dismissed. Plaintiff has alleged no facts to show what a
 21 securities transaction is, how any mortgage becomes a securities transaction, and how
 22 the loan at issue became a securities transaction. Plaintiff has failed to allege which
 23 documents or information provided to her by MortgageIT created a securities
 24 transaction, or which documents violate SEC rules and regulations.

25 Plaintiff ignores the fact that the disclosures made to her, and documents and
 26 information provided to her by MortgageIT were mandated by Federal law as is clearly
 27 shown in the documents themselves. Importantly, Plaintiff acknowledged receipt of
 28

⁴ See MERS print out attached to Request for Judicial Notice as Exhibit H).

1 these documents in writing.⁵ Plaintiff takes the untenable position that the federal
 2 government promotes, and in fact mandates, securities violations by requiring lender to
 3 follow a particular loan process, and to provide particular disclosures, to a borrower.
 4 Such a position is factually and legally unsound.

5 Addressing Plaintiff's claims for relief, any claims arising out of the Truth In
 6 Lending Act disclosures, or RESPA disclosures are time-barred under the one-year
 7 statute of limitations for these claims. 15 U.S.C. § 1640(e) and 12 U.S.C. § 2614.
 8 Further, any claims based upon fraud fail to identify the time, place and manner of the
 9 fraud and, as such, are lacking in the factual specificity required under Fed.R.Civ.P.
 10 9(b), and must be dismissed. Plaintiff's claims based upon an alleged "duty" owed to
 11 her by MortgageIT should be dismissed because the general rule is that as a Lender,
 12 MortgageIT does not owe a duty of care to Plaintiff and she has failed to allege any
 13 basis as to why the general rule is not applicable in this instance.

14 Finally, Plaintiff acknowledges that MortgageIT transferred any interest on the
 15 Subject Property early in 2007. As such, MortgageIT is not in a position to Quiet Title in
 16 the Plaintiff nor is there a contractual relationship currently between the parties which
 17 can be rescinded. Also, there is no ongoing conduct by MortgageIT concerning the
 18 Subject Property which can be enjoined.

19 As for the remaining claims, Plaintiff has failed to allege any wrongdoing by
 20 MortgageIT which would constitute the basis for these claims, nor has she alleged how
 21 any harm caused to her was actually or proximately caused by MortgageIT. Plaintiff's
 22 claims should be dismissed.

23 **C. Plaintiff's Pro Se Status Is Suspect**

24 Although Plaintiff, a bar tender, claims to be in "*Proper Person*," based upon the
 25 complex allegations concerning, among others, unsecured transactions and violations of
 26 SEC rules and regulations, she appears to have been aided in the preparation of the
 27 Complaint by others that are legally trained. Therefore, Plaintiff should not be given the
 28

⁵ See documents attached to Request for Judicial Notice filed concurrently herewith.

latitude ordinarily afforded to pro se Plaintiff or "held to less stringent standards than formal pleadings drafted by lawyers." *Crawley v. Astrue*, 2008 WL 4790111 *4 (D. Nev. 2008).

D. Plaintiff's Alleged Violations Concern RESPA And TILA Documents She Signed In Relation To The Loan On The Subject Property And, Therefore, Plaintiff's Claims Arise Under Federal Law.

Even though Plaintiff has failed to identify any federal statutes in the Complaint, Plaintiff's claims arise under federal law because they allege insufficient disclosure of information and documents which MortgageIT is required to give to Plaintiff under federal housing and lending Acts.

Attached to MortgageIT's Request For Judicial Notice are documents executed by Plaintiff concerning the loan on the Subject Property and which include a Truth In Lending Statement required under the Federal Truth In Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*; and disclosures required under the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.* (See the Truth In Lending Disclosure Statement, and RESPA Disclosure Statement, attached to Request For Judicial Notice as Exhibits I, and J.). Moreover, pursuant to Paragraph 16 of the Deed of Trust, the Deed is to be governed by federal law. (See Deed of Trust, ¶ 16, attached to Request for Judicial Notice, Exhibit A). MortgageIT was required by federal law to make certain disclosures to Plaintiff at various times in the loan transaction process and Plaintiff signed documents acknowledging receipt of these disclosures.

In fact, on HUD's website consumers are advised:

RESPA is about closing costs and settlement procedures. RESPA requires that consumers receive disclosures at various times in the transaction and outlaws kickbacks that increase the cost of settlement services. RESPA is a HUD consumer protection statute designed to help consumers be better shoppers in the home buying process, and is enforced by HUD.

(See Print out from HUD website at http://www.hud.gov/offices/hsg/sfh/res/respa_hm.cfm attached to Request for Judicial Notice as Exhibit G.) Plaintiff alleges that:

///

- 1 • Plaintiff learned of predatory lending practices which took place in the subject
- 2 loan in violation of federal statutes and regulations; (Complaint ¶ 9).
- 3 • Defendants failed to disclose relevant information to Plaintiff (Complaint ¶ 13);
- 4 • Defendants failed to provide accurate, truthful and complete information
- 5 (Complaint ¶ 24);
- 6 • Plaintiff was mislead regarding the nature of the loan. (Complaint ¶ 18).
- 7 • Defendants misrepresented the nature of the loan (Complaint ¶ 28);
- 8 • Defendants were bound by the written agreements with Plaintiff (Complaint ¶ 16);
- 9 • Defendants omitted or misrepresented critical facts concerning the subject loan.
- 10 (Complaint ¶ 23).

11 Plaintiff's claims relate to allegations of insufficient or wrongful disclosure of
 12 information and documents received from Defendants and which are required to be
 13 given to Plaintiff under federal law. MortgageIT respectfully requests this Court take
 14 Judicial Notice of the loan documents which are the basis of the Plaintiff's allegations
 15 and claims and submitted attached to its Request for Judicial Notice.

16 **II. MORTGAGEIT'S OBLIGATIONS UNDER THE FEDERAL HOUSING ACTS:**

17 MortgageIT was required under the federal housing acts, including the Real
 18 Estate Settlement Procedures Act ("RESPA") and the Truth In Lending Act ("TILA"), to
 19 provide mandatory forms and disclosures to Plaintiff as part of the loan process. These
 20 disclosures included providing definitions of key terms, an explanation of the loan
 21 process, and a breakdown of the fees and payments involved in the loan on the Subject
 22 Property, including the RESPA Disclosure Statement, the HUD (Department of Housing
 23 and Urban Development) Settlement Statement, and the Truth In Lending Disclosure
 24 Statement all of which are sanctioned by the federal government, and federal law.
 25 Plaintiff's allegations that providing such information and documents constitutes the
 26 creation of an unsecured transaction which violates SEC rules and regulations, infer that
 27 the federal government itself promotes these alleged securities violations. In addition,
 28 Plaintiff's allegations infer that mortgages that follow the same process and procedures

1 as involved in her loan, which MortgageIT believes might well be in the tens if not
 2 hundreds of thousands of home loans are, in fact, unsecured transactions and violate
 3 SEC regulations. As a matter of law such transactions do not violate SEC rules and
 4 regulations.

5 **II. LEGAL ARGUMENT**

6 Dismissal under Rule 12(b)(6) is proper when a complaint fails "to state a claim
 7 upon which relief can be granted." (Fed.R.Civ.P. 12(b)(6)). The standard of review is
 8 rigorous as a court must "construe the pleading liberally and draw every fair inference in
 9 favor of the non-moving party." Simpson v. Mars, Inc., et al., 113 Nev. 188, 190, 929
 10 P.2d 966, 967 (Nev. 1997), citing Vacation Village v. Hitachi America, 110 Nev. 481,
 11 484, 874 P.2d 744, 746 (Nev. 1994). "All factual allegations of the complaint must be
 12 accepted as true." Id. "A complaint will not be dismissed for failure to state a claim
 13 unless it appears beyond a doubt that the plaintiff could prove no set of facts which, if
 14 accepted by the trier of fact, would entitle him or her to relief." Id. "The test for
 15 determining whether allegations of a complaint are sufficient to assert a claim for relief is
 16 whether the allegations give fair notice of the nature and basis of a legally sufficient
 17 claim and the relief requested." Id.

18 Taking Plaintiff's factual allegations as true, Plaintiff fails to state a claim against
 19 MortgageIT. MortgageIT sold the note on the Subject Property in January, 2007 and,
 20 therefore does not have title to the note, or standing to foreclose on the property. Also,
 21 Plaintiff admits she is no longer in privity of contract with MortgageIT because IndyMac
 22 is identified as the Trustee of the Subject Property meaning MortgageIT cannot give
 23 Plaintiff any contract-based relief she seeks. The remaining claims are time-barred
 24 under the applicable statutes of limitations. As Plaintiff has failed to assert any valid
 25 claim against MortgageIT, all claims must be dismissed in their entirety.

26 ///

27 ///

28 ///

III. **THIS COURT SHOULD GRANT MORTGAGEIT'S MOTION TO DISMISS BECAUSE PLAINTIFF HAS NO STANDING TO BRING THE COMPLAINT AND BECAUSE SHE FAILS TO STATE A CLAIM AGAINST MORTGAGEIT FOR WHICH RELIEF CAN BE GRANTED**

A. **Plaintiff Does Not Have Standing To Bring Her Claims Based Upon Foreclosure Or Irregularities In The Sale Process Of The Subject Property Because Of Failure To Tender:**

Plaintiff has no standing to bring claims concerning the Subject Property because she failed to tender payments when due. FPCIRE-HAB 01 v. E&G Invs., Ltd., 207 Cal.App.3d 1018, 1021 (1989).

An action for tort of wrongful foreclosure will lie if the trustor or mortgagor can establish that at the time the power of sale was exercised or the foreclosure occurred, no breach of condition or failure of performance existed on the mortgagor's part which would have authorized the foreclosure or exercise the power of sale.

Collins v. Union Federal Savings & Loan Ass'n., 99 Nev. 284, 304, 662 P.2d 610, 623 (1983). This tender requirement applies to any cause of action for irregularity in the sale procedure. To challenge the validity of a foreclosure action, a plaintiff must tender the undisputed amount due and owing on the secured indebtedness. Abdallah v. United Savings Bank, 43 Cal.App.4th 1101, 1109 (1996).

Courts have explained:

This rule . . . is based upon the equitable maxim that a Court of Equity will not order a useless act performed . . . if Plaintiffs could not have redeemed the property had the sale procedures been proper, any irregularities in the sale did not result in damages to Plaintiffs.

FPBI Rehab 101 v. ENG Investments, Ltd., 207 Cal.App.3d 1018, 1021 (Cal.Ct.App. 1989). If a borrower who has defaulted on payments requests that a court exercise its equitable powers in granting declaratory or injunctive relief, the borrower must first "do equity" himself. Nolm, LLC v. County of Clark, 120 Nev. 736, 742, 100 P.3d 658, 663 (2004); see also, Overhead Door Co. of Reno, Inc. v. Overhead Door Corp., 103 Nev. 126, 127, 734 P.2d 1233, 1235 (1987). The tender rule is strictly enforced and, absent an alleged and actual tender, the Complaint in its entirety fails to state a claim upon which relief can be granted. Karlsen v. Am. Sav. & Loan Ass'n., 15 Cal.App.3d 112, 117

(1971).

Plaintiff failed to establish that no breach of condition or failure of performance existed on her part which would have authorized the foreclosure or exercise the power of sale. Plaintiff defaulted on payments concerning the Subject Property, and she has failed to tender the full amount owed on her mortgage loan. This is fatal to Plaintiff's claims. Without tender, she has no standing to set aside any foreclosure sale or bring claims based upon alleged irregularities concerning the sale of the subject property. Accordingly, the Complaint should be dismissed in its entirety pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

B. Plaintiff's Claims For Relief Against MortgageIT Must Be Dismissed Because They Are Claims Arising Under Federal Housing And Loan Acts And Are Time-Barred Under The Applicable Limitations Period

Plaintiff's claims against MortgageIT are based on conduct relating to the loan agreement with MortgageIT entered into on October 16, 2006. Plaintiff's allegations concerning this loan agreement include a the loan being inappropriate for its purported purpose, (Complaint ¶ 18), failing to provide accurate, truthful and complete information (Complaint ¶ 22), and making false misrepresentations to Plaintiff. (Complaint ¶¶ 48 - 61). Despite these numerous allegations concerning loan documents and information, Plaintiff fails to attach any related or relevant documents to her Complaint.

The procedures and processes concerning home loans and mortgages are strictly regulated by numerous federal acts including Federal Truth In Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*; the Home Ownership and Equity Protection Act ("HOEPA"), within Regulation Z, 12 C.F.R. § 226; and the Real Estate Settlement Procedures Act ("RESPA"), 12 U.S.C. § 2601 *et seq.* Even though Plaintiff has made no reference to these federal laws, the Acts themselves dictate that MortgageIT abide by these laws when conducting residential loan transactions. (See generally, the TILA, and RESPA). In fact, evidence shows that Plaintiff signed numerous documents required to be provided to them under these federal acts. (See Deed of Trust executed by Plaintiff, Truth In Lending Statement and RESPA Servicing Disclosure attached to

the Request for Judicial Notice as Exhibits A, I, and J, respectively).

Even though Plaintiff failed to specifically identify provisions of the TILA, and RESPA, any of Plaintiff's claims conceivably arising under the TILA, and RESPA as against MortgageIT are time-barred under the applicable one year statute of limitations (15 U.S.C. § 1640(e) and 12 U.S.C. § 2614). Plaintiff admits she entered into the loan agreement with MortgageIT in October, 2006. Plaintiff filed this lawsuit on August 24, 2009, well beyond the one year limitations period. Plaintiff's claims based on misrepresentations and other irregularities concerning the loan obtained from MortgageIT on the Subject Property must be dismissed.

C. Plaintiff's Claims For Relief Against MortgageIT Must Be Dismissed Because They Fail To State A Claim Against MortgageIT Under Rule 12(b)(6).

Fed.R.Civ.P. 12(b)(6) authorizes a court to dismiss the Complaint for failure to state a claim upon which relief can be granted. (Fed.R.Civ.P. 12(b)(6)). To survive a motion to dismiss, the Complaint must be sufficiently pled to show the Plaintiff is entitled to relief. On a motion to dismiss, the court must accept well-pleaded factual allegations as true, and reasonable inferences are to be drawn in the Plaintiff's favor. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2509 (2007)). However, only "fair" inferences must be accepted by the court. Simpson v. Mars, Inc., 929 P.2d 966, 967 (Nev. 1997). Bald contentions, unsupported characterizations, and legal conclusions are not well-pleaded allegations, and will not suffice to defeat a motion to dismiss. G.K. Las Vegas, Ltd. P'ship v. Simon Prop. Group, Inc., 460 F.Supp.2d 1246, 1261 (D. Nev. 2006).

"The test for determining whether allegations of a complaint are sufficient to assert a claim for relief is whether the allegations give fair notice of the nature and basis of a legally sufficient claim and the relief requested." Simpson v. Mars, Inc., et al., 113 Nev. 188, 190, 929 P.2d 966, 967 (Nev. 1997), citing Vacation Village v. Hitachi America, 110 Nev. 481, 484, 874 P.2d 744, 746 (Nev. 1994).

MortgageIT reasonably believes when viewing the allegations in the Complaint in

1 the light most favorable to the Plaintiff, there is an absence of facts, and no cognizable
2 legal theory upon which Plaintiff can prevail on any claim against MortgageIT.

3 1. Plaintiff Cannot Prevail On Her First Claim For Relief For Breach
4 Of Contract Because She Fails To Identify Which Contract Was
5 Breach, By Whom And How And Failed To Plead Any Non-
6 Performance Or Breach By MortgageIT.

7 Plaintiff cannot prevail on her breach of contract claim because she fails to plead
8 the elements of the claim with sufficient particularity under Rule 8 or with "enough facts
9 to state a claim to relief that is plausible on its face. Gowen v. Tiltware, LLC, 2009 WL
10 1441653 *3 (D.Nev.) To prevail on a Breach of Contract claim, the Plaintiff must
11 establish through her factual allegations that: (1) there was a contract; (2) plaintiff
12 performed under the agreement or that her non-performance was excused; (3)
13 MortgageIT's breach; and (4) the resulting damages to Plaintiff. Id. Plaintiff pleads only
14 that:

- 15 • Plaintiff and Defendant entered into various written agreements connected
16 with the subject mortgage loan.
- 17 • Plaintiff diligently performed each task she was required to do under the
18 terms of the agreement
- 19 • Plaintiff discontinued making payments
- 20 • Defendant failed to perform in good faith and lacked full disclosure
21 necessary to fulfill the obligations
- 22 • Defendants caused Plaintiff damages.

23 (Complaint ¶¶ 12 - 14).

24 Plaintiff's claim fails because first, she fails to identify which of the "various
25 agreements" was breached and by which Defendant, and what was the nature of the
26 breach, for example, how did the Defendant not perform according to the terms of the
27 agreement? Second, she cannot claim she has herself fulfilled her obligations under
28 any agreement when she admits she ceased payments on the mortgage when she
discovered the alleged "wrongful behavior of Defendant." Importantly, she fails to offer
sufficient facts as to how, when and where she discovered the alleged "wrongful

1 behavior" or why she believed she was then relieved of her own obligations to make
 2 payments under the agreement. She also fails to offer facts as to what she did when
 3 she "began seeking remedies which could cure the matter." (Complaint ¶12).

4 The loan agreement with MortgageIT consisted of documents and disclosures
 5 mandated by the Federal housing statutes. Plaintiff has not alleged that MortgageIT
 6 failed to provide her with any of these mandated disclosures. The loan agreement with
 7 MortgageIT was for the purpose of refinancing the Subject Property and for the Plaintiff
 8 to continue residing at the Subject Property. Plaintiff has failed to allege any facts
 9 establishing how MortgageIT breach an agreement, or failed to perform when Plaintiff's
 10 loan was refinanced as contracted, and when Plaintiff continued to live at the Subject
 11 Property for approximately three (3) years after the loan was entered into. Moreover,
 12 MortgageIT transferred the loan agreement in January 2007 and Plaintiff would have to
 13 establish that the alleged breach occurred sometime between October 2006 when the
 14 loan was entered into, and January 2007 when the loan was transferred. The facts
 15 establish that Plaintiff did receive the benefit of the bargain she entered into, namely
 16 refinancing the loan and residing at the Subject Property. Plaintiff has failed to allege
 17 any breach by MortgageIT that is plausible and this claim must be dismissed.

18 2. Plaintiff Cannot Prevail On Her Second Claim For Breach Of Duty
 19 Of Good Faith And Fair Dealing Because She Has Failed To
 20 Identify Any Wrongful Conduct By MortgageIT Occurring After
 August 2006 And That MortgageIT's Conduct Was The Actual Or
Proximate Cause Of Plaintiff's Alleged Harm

21 An implied covenant of good faith and fair dealing is recognized in every contract
 22 under Nevada law. Pemberton v. Farmers Ins. Exchange, 109 Nev. 789, 792-93, 858
 23 P.2d 380, 382 (1993). The implication is that a contract must exist before this covenant
 24 can be recognized. Further, any breach of the covenant can only occur after the
 25 contract is formed. Plaintiff admits she entered into a contract with MortgageIT in
 26 August 2006. Therefore, to prevail on a claim for breach of covenant of good faith and
 27 fair dealing against MortgageIT, Plaintiff must establish that MortgageIT's breach
 28 occurred sometime after October 2006.

1 Plaintiff's allegations are vague stating only that, Defendants were bound by the
 2 agreements, oral or written made by and between Defendants and Plaintiff. (Complaint
 3 ¶ 16), and that "Defendants violated their duties and breached the covenant of good
 4 faith and fair dealing." (Complaint ¶ 18). Plaintiff fail to establish not only what duty
 5 MortgageIT as a lender owed to Plaintiff, but also what the breaching conduct by
 6 MortgageIT was, and that the alleged breach occurred after October 2006, and before
 7 the note was sold.

8 An implied covenant of good faith and fair dealing prohibits arbitrary or unfair acts
 9 by one party that work to the disadvantage of the other. Nelson v. Heer, 123 Nev. 26,
 10 163 P.3d 420, 427 (Nev. 2007). To prevail on her claim, Plaintiff must not only establish
 11 that MortgageIT engaged in an arbitrary or unfair conduct some time after October
 12 2006, but also that the conduct was the actual or proximate cause of harm or
 13 disadvantage to Plaintiff. Moreover, Plaintiff acknowledges that MortgageIT transferred
 14 the note to MERS, and that it is IndyMac Federal Bank which is now claiming title to the
 15 Subject Property. (Complaint ¶ 9).

16 Plaintiff claims she suffered "severe economic and personal damages," as result
 17 of Defendants' conduct." (Complaint ¶ 18). However, a "Plaintiff must establish that
 18 defendants' violation was both the "but for" and proximate cause of a concrete financial
 19 injury." Izenberg v. ETS Services, LLC, 2008 WL 5179088 *5 (C.D. Cal. 2008)).
 20 Plaintiff does not establish how her alleged damages were caused by "Defendants'
 21 failures," or that any damages she may have incurred under this claim were actually or
 22 proximately caused specifically by MortgageIT. Plaintiff has no cognizable claim against
 23 MortgageIT and this claim must be dismissed.

24 3. Plaintiff Cannot Prevail On Her Third Claim For Negligence
 25 Because Plaintiff Has Failed To Establish Any Duty Or Breach By
 26 MortgageIT, Or Shown That MortgageIT Was The Proximate And
Actual Cause Of Plaintiff's Harm.

27 Plaintiff's claim fails as a matter of law because she fails to allege a valid duty
 28 owed by MortgageIT to Plaintiff. To prevail on a claim for negligence against

1 MortgageIT, Plaintiff must set forth allegations sufficient to establish the following
 2 elements of negligence: (1) that MortgageIT owed Plaintiff a duty of care; (2) that
 3 MortgageIT breached that duty; (3) that the breach was the legal and proximate cause
 4 of Plaintiff's harm; and (4) that Plaintiff suffered damages. Hammerstein v. Jean Dev.
 5 West, 111 Nev. 1471, 1475, 907 P.2d 975, 977 (1995).

6 Plaintiff "creates" the following duties and attempts to assign them to MortgageIT:
 7 (1) a duty to perform professional services in a reasonable and prudent manner,
 8 including accurately and truthfully representing information concerning the loan; and (2)
 9 a duty to deal honestly, directly, and accurately with the Plaintiff." (Complaint ¶ 22). No
 10 such duties exist as a matter of law and Plaintiff's claims must fail.

11 MortgageIT is a financial institution and as "a general rule, a financial institution
 12 owes no duty of care to a borrower when the institution's involvement in the loan
 13 transaction does not exceed the scope of its conventional role as the mere lender of
 14 money." Nymark v. Heart Fed. Sav. & Loan Ass'n., 231 Cal.App.3d 1089, 1096, 283
 15 Cal.Rptr. 53, 56 (1991). The Plaintiff has not alleged, nor could she support such an
 16 allegation, that MortgageIT's involvement in the loan exceeded the scope of its
 17 conventional role as a lender of money to Plaintiff.

18 Plaintiff alleges vaguely that Plaintiff was not apprised by an unnamed Defendant
 19 that the process was not a normal loan, that the loan was a concealed securities
 20 transaction, and Defendant continued to attempt to recover monies it was no longer
 21 owed, and foreclosed on the Subject Property. (Complaint ¶23). However, Plaintiff
 22 offers no factual basis that the loan was not "normal," that the loan was a "concealed
 23 securities transaction," or explain factually what monies were attempted to be recovered
 24 by which Defendant. Significantly, MortgageIT did not foreclose on the subject property
 25 as Plaintiff acknowledges in the Complaint when she states "in or around February,
 26 2007, the loan was transferred to Indymac Bank." (Complaint ¶ 8). None of these
 27 allegations establish any wrongdoing by MortgageIT.

28 Plaintiff's claim continues with allegations of predatory lending, claims that the

loan was an unregulated security and violated SEC rules and regulations and that the appraisal of the Subject Property was wrongfully inflated. (Complaint ¶9). Importantly these allegations purported were conducted by "aggregators, brokers and other third parties," not MortgageIT. (Complaint ¶ 9). None of these allegations appear to have any relevance to a claim for "Negligence," nor do they allege any wrongdoing by MortgageIT, or establish a duty was owed to Plaintiff by MortgageIT.

Finally, Plaintiff does not establish how her alleged damages she may have incurred under this claim were actually or proximately caused specifically by MortgageIT. Plaintiff has no cognizable claim against MortgageIT and this claim must be dismissed.

4. Plaintiff Cannot Prevail On Her Fourth Claim For Relief For Fraud/Misrepresentation Because Plaintiff Fails To Plead The Claim With The Particularity Required Under Fed.R.Civ.P. 9(b).

"It is well established in the Ninth Circuit that both claims for fraud and negligent misrepresentation must meet Rule 9(b)'s particularity requirement." G.K. Las Vegas Limited Partnership v. Simon Property Group, 460 F.Supp.2d 1222, 1224 (D. Nev. 2006); see also Glen Holly Entertainment, Inc. v. Tektronix, Inc., 100 F.Supp.2d 1086, 1093 (C.D. Cal. 1996). Plaintiff fails to plead the elements of fraud with the particularity required under Nevada law and this claim must be dismissed. (FRCP 9(b)). Under Rule 9(b), a plaintiff is required to plead facts as to **time, place and substance of the fraud**, specifically detail the defendant's allegedly **wrongful acts**, including **when** they occurred and **who** engaged in the misconduct. Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997) [Emphasis added]. Averments of fraud must be specific enough to put a defendant on notice of the particular misconduct the defendant is alleged to have committed so that the defendant can properly defend against the allegations. Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1104 (9th Cir. 2003). Plaintiff fails to allege the time, place and substance of any fraudulent act by MortgageIT so her claim must fail as a matter of law.

Under Nevada law, the elements of fraud are: (1) a false representation made by

1 the defendant; (2) defendant's knowledge or belief that the representation was false (or
 2 insufficient basis for making the representation); (3) defendant's intention to induce the
 3 plaintiff to act or refrain from acting in reliance upon the misrepresentation; (4) plaintiff's
 4 justifiable reliance upon the misrepresentation; and (5) damages to the plaintiff resulting
 5 from such reliance. Bulbman, Inc. v. Nev. Bell, 108 Nev. 105, 825 P.2d 588, 592
 6 (1992).

7 Plaintiff does not allege that MortgageIT made a false representation to her, that
 8 MortgageIT knew the representation was false, that MortgageIT intended to induce
 9 Plaintiff to act, or refrain from acting in reliance upon the misrepresentation, that the
 10 Plaintiff justifiably relied upon the representation and how; and how Plaintiff was
 11 damaged by relying on the misrepresentation.

12 Plaintiff does not allege fraud with sufficient particularity as required under FRCP
 13 9(b), or in any understandable way for MortgageIT to determine what is at issue.
 14 Finally, Plaintiff does not establish what damages were caused to her, when and by
 15 whom, or that any damages she might have incurred were actually or proximately
 16 caused by Mortgage. Plaintiff has no cognizable claim against MortgageIT and this
 17 claim must be dismissed.

18 5. Plaintiff Cannot Prevail On Her Fifth Claim For Relief For Civil
 19 Conspiracy Because Plaintiff Has Failed To Plead That There Was
 20 A Meeting Of The Minds Between Two Or More Defendants To Act
For An Unlawful Purpose.

21 Plaintiff has not sufficiently pled the elements of a civil conspiracy which is
 22 defined as "a combination of two or more persons who, by some concerted action,
 23 intend to accomplish some unlawful objective for the purpose of harming another which
 24 results in damage. Ungaro v. Desert Palace, Inc., 732 F.Supp. 1522, 1532 (D. Nev.
 25 1989) (citing to Collins v. Union Federal Sav. & Loan, 99 Nev. 284, 662 P.2d 610, 622
 26 (1983)).

27 To state a cause of action for conspiracy the complaint must allege: (1) the
 28 formation and operation of the conspiracy; (2) the wrongful act or acts done pursuant

1 thereto; and (3) the damage resulting from such act or acts. Id. "The sine qua non of a
2 conspirational agreement is the knowledge on the part of the alleged conspirators of its
3 unlawful objective." Id. "The alleged facts must show either expressly or by reasonable
4 inference that Defendant had knowledge of the object and purpose of the conspiracy,
5 that there was an agreement to injure the Plaintiff, that there was a meeting of the minds
6 on the objective and course of action, and that as a result one of the defendants
7 committed an act resulting in the injury. Id.

8 Plaintiff's claim fails because there could never be a conspiracy between the
9 Defendants in this action. MortgageIT sold the note in January 2007, and Indymac
10 Bank assumed the note in January 2007. At no time did the two defendants have a
11 concurrent interest in the loan, or the Subject Property. As civil conspiracy requires "two
12 or more persons" and as Plaintiff has failed to identify one, let alone two or more,
13 involved in this conspiracy the claim fails. Thus there could never be a "meeting of the
14 minds" between the two Defendants in this action, which is a required element of this
15 claim. Id. At the time MortgageIT entered into the loan on the Subject Property with
16 Plaintiff, Indymac Bank was not even in the picture so no action by MortgageIT during its
17 brief holding of the note could be done to benefit Indymac as a co-conspirator.
18 Similarly, at the time when Indymac Bank obtained an interest in the loan on the Subject
19 Property, MortgageIT had relinquished all of its interest in the loan such that no action
20 by Indymac Bank could benefit MortgageIT, nor has Plaintiff alleged that it did.

21 The claim also fails because she fails to allege how MortgageIT's involvement in
22 the loan on the Subject Property became an "unlawful objective" and when. Nor has
23 she alleged how MortgageIT had knowledge of the "unlawful objective." Further,
24 Plaintiff has failed to allege how MortgageIT's "wrongful" actions were to further its own
25 interest, and to cause injury to her. MortgageIT is not liable for any injury which is
26 incidental. Id.

27 Plaintiff's mere allegations of a civil conspiracy violation, do not suffice to
28 adequately plead the requisite defendant intent to accomplish an unlawful objective.

This claim fails and should be dismissed against MortgageIT.

6. Plaintiff Cannot Prevail On Her Sixth Claim For Relief For She Failed To Exercise Her Three Day Right To Rescind And Has Failed To Establish Why She Is Excused From This Time Limitation.

Congress enacted the HOEPA as an amendment to the TILA, 15 U.S.C. § 1601 *et seq.* (Pub. L. 103-325, 108 Stat. 2160). Any disclosure violation arising under this statute is barred by the one year statute of limitations under 15 U.S.C. § 1640(e). Plaintiff admits she entered into a loan agreement with MortgageIT in October 2006 more than a year prior to the filing of this Complaint in August 2009. Plaintiff's claim under the HOEPA is time-barred as against MortgageIT.

Additionally, Plaintiff seeks rescission. (Complaint ¶ 42). Under RESPA:

The consumer may exercise the right to rescind until midnight of the third business day following the occurrence described in paragraph (a) (1) of this section that gave rise to the right of rescission . . .

12 C.F.R. § 226.15 (a) (3). Plaintiff fails to allege facts to show that her claim is excused from the three day limitation on the right to rescind, measured from the date of closing on the loan which Plaintiff admits was October 16, 2006.

Additionally, Plaintiff has not established that she has standing to bring this claim under the HOEPA. To be entitled to seek rescission under 12 C.F.R. § 226.15, Plaintiff must first establish that she met the notice requirement.

This sub-section of the HOEPA states:

To exercise the right to rescind, the consumer shall notify the creditor of the rescission by mail, telegram, or other means of written communications.

12 C.F.R. § 226.15 (a)(2). Plaintiff does not allege any facts showing she timely notified MortgageIT in writing that she intended to exercise her right of rescission. Plaintiff's Complaint alleges only that she notified OneWest Bank, as successor-in-interest to Indymac Bank a Notice of Rescission which has no bearing on the loan agreement with MortgageIT.

Finally, by Plaintiff's own admission, MortgageIT no longer has any title, right or

1 interest in the Subject Property. The note was assigned to Indymac Bank in January
 2 200, and upon information and belief as been reassigned since. MortgageIT is no
 3 longer in privity of contract with Plaintiff and there is no current and binding contract to
 4 rescind. This claim against MortgageIT must be dismissed.

5 7. Plaintiff Cannot Prevail On Her Seventh Claim For Relief For
 6 Wrongful Foreclosure Against MortgageIT Because MortgageIT
 7 Relinquished All Interest In The Subject Loan Years Ago And Is Not
 Involved In Any Foreclosure Action Against The Subject Property.

8 Plaintiff brings this claim but alleges no facts that a foreclosure on the Subject
 9 Property has occurred, when it occurred, or who instigated the action. Importantly,
 10 Plaintiff has failed to allege that MortgageIT was involved in any manner in the "wrongful
 11 foreclosure" particularly when Plaintiff acknowledges that MortgageIT relinquished any
 12 right it had in the Subject Property in early 2007. (Complaint ¶ 8).

13 Under Nevada law, "[a]n action for the tort of wrongful foreclosure will lie if the
 14 trustor or mortgagor can establish that at the time the power of sale was exercised or
 15 the foreclosure occurred, no breach of condition or failure of performance existed on the
 16 mortgagor's or trustor's part which would have authorized the foreclosure or exercise of
 17 the power of sale." Collins v. Union Federal Savings and Loan, Assoc., 99 Nev. 284,
 18 304, 662 P.2d 610 (1983).

19 Plaintiff has not alleged when the foreclosure on the Subject Property occurred or
 20 alleged that on that date she had performed all of her obligations under the loan
 21 agreement, including making all payments due at that time, and that the foreclosure was
 22 wrongfully brought. Plaintiff's allegations instead go off on a tangent citing to alleged
 23 violations of Nevada's Deceptive Trade Practices Act, specifically NRS §598.0195, and
 24 a discussion of rescission, binding arbitration, wrongfully using Plaintiff's identity, and a
 25 "windfall" that third parties are trying to gain. (Complaint ¶¶ 47-61). Plaintiff's
 26 allegations under this claim are confusing and MortgageIT reasonably believes Plaintiff
 27 intended to bring the claim under NRS§ 598D which is the standard claim for relief that
 28 Plaintiffs in these mortgage foreclosures action have brought. Plaintiff's claim is

1 confusing and on that basis alone is insufficient to meet the notice requirements of Rule
2 8.

3 Regardless, MortgageIT has brought no foreclosure action against the Subject
4 Property and logically cannot be charged with wrongful foreclosure. As such, this claim
5 must be dismissed.

6 8. Plaintiff Cannot Prevail On Her Eighth Claim For Relief For Quiet
7 Title Against MortgageIT Because MortgageIT Does Not Have The
8 Ability To Quiet Title In The Subject Property In Plaintiff.

9 Plaintiff's claim to Quiet Title in herself appears to be directed at OneWest Bank
10 which she alleges is not entitled to foreclose on the Subject Property because it is, "not
11 presently the true owner of the note and holder in due course, nor entitled to possession
12 of the property located at 213 Night Fall Terrace, Henderson, Nevada 89015," nor is it
13 entitled to foreclose on the property. (Complaint ¶ 65). None of her allegations under
14 this claim are addressed specifically to MortgageIT or identify any wrongdoing by
15 MortgageIT.

16 Plaintiff admits that after she entered into the loan agreement with MortgageIT in
17 October 2006, MortgageIT transferred the loan to Indymac Bank." (Complaint ¶8). By
18 Plaintiffs' own admission, MortgageIT does not have title to the Subject Property and
19 cannot, therefore, give Plaintiff the Quiet Title relief she seeks. This claim against
20 MortgageIT must be dismissed.

21 Additionally, Plaintiff has failed to assert that she has good title and is entitled to
22 bring a claim to quiet title. In a quiet title action, the burden of proof rests with the
23 plaintiff to prove good title in himself. Ernie v. Trinity Lutheran Church, 51 Cal.2d 702,
24 336 P.2d 525 (1959); Olsen v. Park Daughters Investment Company, 29 Utah 2d 421,
25 511 P.2d 145, 146 (1973). Plaintiff has failed to allege the essential elements for a
26 claim for quiet title, and this claim must be dismissed.

27 Finally, Plaintiff fails to allege that any particular conduct by MortgageIT was the
28 actual or proximate cause of any harm to Plaintiff. As Plaintiff fails to sufficiently allege
a claim against MortgageIT, this claim must be dismissed.

9. Plaintiff Cannot Prevail On Her Ninth Claim For Relief For Injunctive Relief Against MortgageIT Because There Is No Ongoing Conduct By MortgageIT Which Can Be Enjoined.

Plaintiff cannot prevail on this claim against MortgageIT because she admits that MortgageIT sold the note on the Subject Property after the loan closed on October 16, 2006. (Complaint ¶8). Plaintiff acknowledges that MortgageIT assigned its right to Indymac Bank. (Complaint ¶8). Plaintiff alleges it now a successor-in-interest, OneWest Bank who is "currently" involved in the foreclosure action against the Subject Property. (Complaint ¶¶ 65, 71). By omission, Plaintiff acknowledges that MortgageIT was not, and is not involved in any foreclosure action against the Subject Property. Thus, there is no action by MortgageIT concerning the foreclosure that can be restrained, enjoined or for which the Plaintiffs are entitled to damages.

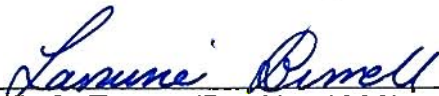
Significantly, Plaintiff does not establish how her alleged damages or entitlement to equitable relief were actually or proximately caused specifically by MortgageIT, particularly when she has failed to allege any action was taken by MortgageIT in relation to the foreclosure. Therefore, Plaintiff's claim for injunctive relief is inappropriate and should be dismissed.

III. CONCLUSION

Based upon foregoing reasons, MortgageIT believes it has met its burden to prevail on a motion to dismiss. MortgageIT respectfully requests that its motion be granted and that all claims against MortgageIT be dismissed.

DATED: 16 September 2009.

GREENBERG TRAURIG, LLP


 Mark G. Tratos (Bar No. 1086)
 F. Christopher Austin (Bar No. 6559)
 Laraine M. I. Burrell (Bar No. 8771)
 3773 Howard Hughes Parkway
 Suite 400 North
 Las Vegas, Nevada 89169
 Counsel For Defendant
 MORTGAGEIT CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that on September 16, 2009, I served the foregoing
**DEFENDANT, MORTGAGEIT, INC.'S MOTION TO DISMISS FOR FAILURE TO
STATE A CLAIM PURSUANT TO FRCP 12(b)(6)** on:

Heidi Duffy
213 Night Fall Terrace
Henderson, Nevada 89015

Plaintiffs in Proper Person

by causing a full, true, and correct copy thereof to be sent by the following indicated
method or methods, on the date set forth below:

☒ by mailing in a sealed, first-class postage-prepaid envelope, addressed to
the last-known office address of the attorney, and deposited with the
United States Postal Service at Las Vegas, Nevada.

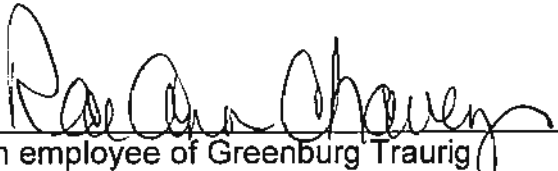
☐ by hand delivery.

☐ by sending via overnight courier in a sealed envelope.

☐ by faxing to the attorney at the fax number that is the last-known fax
number

☐ by electronic mail to the last known e-mail address

DATED: September 16, 2009.


An employee of Greenburg Traurig